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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/628,992	07/29/2003	Greg Franich	7942-000008	7349

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HARNESS, DICKEY & PIERCE, P.L.C.
P.O. BOX 828
BLOOMFIELD HILLS, MI 48303

EXAMINER

ESTREMSKY, GARY WAYNE

ART UNIT PAPER NUMBER

3676

DATE MAILED: 05/05/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/628,992

Applicant(s)

FRANICH, GREG

Examiner

Gary Estremsky

Art Unit

3676

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 February 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) 8-12 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 13-17 is/are allowed.
- 6) ☒ Claim(s) 1-7 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 29 July 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Election/Restrictions

1. Applicant's election of the invention of claims 1-7 and 13-17 in the reply filed on 2/1/05 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)). Regardless, the restriction requirement has been carefully reconsidered. It is the examiner's position that restriction for the reasons indicated is proper and the requirement is made Final.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1-6 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Pat. No. 4,275,830 to McDonald

While prior art in the same field of endeavor as the disclosed invention has been relied upon in an effort to expedite prosecution, it's noted that functional recitations of a "dumpster container" in the preamble and the body of the claim do not include a "dumpster container" as part of the invention whereby there is no requirement that anticipatory prior art illustrate or otherwise teach same. Reference to MPEP 2114 as

Art Unit: 3676

regards proper interpretation of functional language is suggested. It has been held that a preamble is denied the effect of a limitation where the claim is drawn to a structure and the portion of the claim following the preamble is a self-contained description of the structure not depending for completeness upon the introductory clause. *Kropa v. Robie*, 88 USPQ 478 (CCPA 1951). It has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

McDonald '830 teaches Applicant's claim limitations including : a "main locking device" - 31, a "blocking plate" - 40 where rightwards position (as shown in Fig 1) prevents unlatching movement of 31, a "handle linkage" - limitation is broad and is anticipated by part 39 where either its upper end, or the combination of cable and/or triangle reads on "handle".

As regards claim 3, the "overcenter position" limitation is broad since it is not defined in terms of any particular structure, etc., and has not patentably distinguished from the prior art where unblocking/unlatching inherently occurs before the dumpster is tipped 'overcenter' to a dumping position. The law of anticipation requires that a distinction be made between the invention described or taught and the invention claimed. It does not require that the reference "teach" what the subject patent teaches. Assuming that a reference is properly "prior art," it is only necessary that the claims under consideration "read on" something disclosed in the reference, i.e., all limitations of the claim are found in the reference, or "fully met" by it. *Kalman v. Kimberly-Clark*

Art Unit: 3676

Corp., 218 USPQ 789. It is suggested that elements and geometry related to the limitation be included in the claim. Claims in a pending application should be given their broadest reasonable interpretation. *In re Pearson*, 181 USPQ 641 (CCPA 1974).

As regards claim 4, the upper triangular portion of 31 reads on "main locking device" and part 36 and vertical portion of 31 reads on "interconnecting linkage pivotally coupled between said handle linkage (39) and said blocking plate (40)".

As regards claim 5, part 39 is "angularly shaped" and its vertical portion remains generally parallel to the vertical portion of 31.

As regards claim 6, the cable reads on limitation where "engageable" is literally interpreted as 'capable to engage' and does not positively recite *engagement*.

Accordingly, an anticipatory reference does not have to teach engagement, only the ability to engage. One of ordinary skill in the art would recognize that the cable is flexible enough to be inherently capable of engaging as recited. It has been held that the recitation that an element is "capable of" performing a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchison*, 69 USPQ 138.

4. Claims 1, 3, 5, and 7 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Pat. No. 4,014,572 to Binns.

While the latch of Binns '572 is not disclosed to be attached to a dumpster and base, it is inherently capable of such use. It has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not

Art Unit: 3676

differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

Binns '572 teaches Applicant's claim limitations for a locking device including : a "main locking device" - including 15, a "blocking plate" - including 12 where rightwards position (as shown in Fig 1) prevents unlatching movement of 15, "pivotally coupled" – 12 becomes pivotally coupled with 15 when they assume the latched position of Fig 2. Furthermore limitation of 'coupled' is broad enough to include intermediate elements. Binns '572 also teaches : a "handle linkage" - limitation is broad and is anticipated by part 14 where again part 12 is pivotally coupled to the handle when it swings into its latching position. It is suggested that "pivotally coupled to" limitations be replaced with – pivotally mounted on—to more accurately describe the invention as disclosed.

As regards claim 3, the unblocking position of the blocking plate inherently occurs before portion 36 can pass "overcenter" an line passing through pivot axis 19,19 to its unlatched position.

As regards claim 5, noting geometry of the handle and the blocking plate in Fig's 1 and 2, it is apparent that those parts are inherently capable of assuming a parallel position in between the illustrated positions that reads on functionally-recited capability.

Allowable Subject Matter

5. Claims 13-17 are allowed.

Art Unit: 3676

Conclusion

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

U.S. Pat. No. 3,041,030 to Heimrich.

U.S. Pat. No. 3,968,984 to Guth.

U.S. Pat. No. 5,011,360 to Abram.

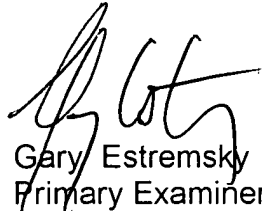
U.S. Pat. No. 5,951,230 to Kruzick.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gary Estremsky whose telephone number is 703 308-0494. The examiner can normally be reached on M-Thur 7:30-6.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tom Will can be reached on 703 308-3870. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 3676

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Gary Estremsky
Primary Examiner
Art Unit 3676